



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2120 OF 2005

IN THE MATTER OF THE ESTATE OF SAMUEL WAMBUGU NGUNYI (DECEASED)

RULING

1. The application for determination is dated 6th June 2016. It seeks the committal to civil jail of Ileen Wamaitha Wambugu and Faith Njambi Wambugu for contempt of court. It is brought at the instance of Joy Muthoni Wambugu. It is contended that the court made certain orders on 30th October 2015, directed at the respondents, with regard to certain assets of the estate, that is to say Kajiado/Kaputiei North/11914, 11917 and 58225, Plot No. 388/Residential – Noonkopir Trading Centre and Plot No. 563/Residential – Noonkopir Trading Centre. The said orders were to be complied with within a stipulated period of time. It is contended that there has been no compliance therewith. The factual background is detailed in the affidavit in support of the application, sworn on 6th June 2016 by the applicant.

2. The response to the application is through an affidavit sworn on 5th August 2016 by Faith Njambi Wambugu. She pleads that the administrators could not comply with the orders within the short period of time allowed by them, and in any event they did not have all the relevant documents needed for the purpose of the response. She avers that upon getting a copy of the ruling they went about trying to procure the relevant documents so as to provide the accounts.

3. She explains that Kajiado/Kaputiei North/5641 had been subdivided by the deceased into twenty (20) plots prior to his death. She has attached copy of the relevant mutation form to support her assertions. The said subdivision is alleged to have been done in 1998. One of the creatures of the subdivision was Kajiado/Kaputiei North/5825. Kajiado/Kaputiei North/5825 was subsequently amalgamated with other parcels to create Kajiado/Kaputiei North/11910, which was subdivided in 2001 by the deceased into several portions, including Kajiado/Kaputiei North/11914 and 11917. Therefore Kajiado/Kaputiei North/5825 did not exist as at the date of the deceased's death. She states that the listing of Kajiado/Kaputiei North/5825 as an asset in the estate of the deceased was therefore in error.

4. The second respondent further explains that Kajiado/Kaputiei North/11914 and 11917 were sold in 2009 following the confirmation of the grant in 2007 to meet several family needs, including the funeral of the deponent's grandmother. She asserts that the non-administrator children of the deceased, including the applicant, were aware of the sales and had consented to them through powers of attorney that they had executed. The two were sold for Kshs. 700, 000.00, and after settling the family debts and expenses the surplus was shared out amongst the beneficiaries. The applicant is said to have received a sum of Kshs. 100, 000.00 from that surplus. She pleads that she has been unable to trace the documents relating to the sale and explained that the said sale took place some seven years from the date she swore the affidavit.

5. Regarding Plot No. 388/Residential – Noonkopir Trading Centre, she explains that the same was a rental property left behind by the deceased. She says it is in a poor state and fetched little rental income. The same was allegedly sold in 2015, and she has attached a sale agreement to her affidavit relating to the

sale thereof. The proceeds of sale were thereafter distributed to all the survivors of the deceased, including the applicant, who received Kshs. 3, 000, 000.00. On Plot No. 563/Residential – Noonkopir Trading Centre, she explains that although there was some documentation showing that the property belonged to the deceased, the same had not been identified on the ground. Their efforts to locate it through the relevant state agencies had been fruitless hence their conclusion that it had been grabbed.

6. The reply to the application elicited a rejoinder by the applicant through an affidavit sworn on 26th September 2016. She contends that no proper account has been given with regard to Kajiado/Kaputiei North/5825, 11914 and 11917, as no proper proof was provided that the said property had been sold. She states that it has not been explained under whose authority was the property sold, when the sale took place, who bought it and for what consideration, and an account of how the proceeds of sale were applied. She renounces the power of attorney attached on the grounds that the same was not registered.

7. On Plot No. 388/Residential – Noonkopir Trading Centre, she contends that the account given was not candid for the first respondent had in her affidavit of 17th March 2016 averred that that property had been drawing an income in the region of Kshs. 40, 000.00 to Kshs. 70, 000.00, presumably per month, depending on the occupancy of the units. She complains that the administrators have refused to account for the said property on the excuse that it was in a poor state. She further complains that the property was sold during the pendency of her application, which, to her was in bad taste. She complains further that after the property was sold, without her consent, and thereafter the administrators went ahead and had a sum of Kshs. 3,000,000.00 deposited in her bank account without her consent. On the accounts prepared by the auditor, she points to the conclusion by the auditor that the said accounts did not provide a true and accurate state of financial affairs for the year in question as they were based on estimates.

8. Directions were given on 2nd November 2016 for disposal of the application by way of written submissions. Both sides complied by filing written submissions. I have had occasion to read through them and to note the arguments made therein.

9. The order said to have been disobeyed was made on 30th October 2015. It was in the following terms:

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“(a) That prayer 2 of the application is granted in the following terms:-

i. An account be rendered in respect of Kajiado/Kaputiei North/5825, 11914 and 11917 which should include details as to where and on whose authority Kajiado/Kaputiei North/5825 was subdivided, when and with whose authority Kajiado/Kaputiei North/11914 and 11917 were sold, for what consideration and how the proceeds of sale were applied;

ii. An account be rendered in respect of Plot No. 388/Residential – Noonkopir Trading Centre, which should include detail on how much is and has been collected as rent from the premises on the said property from 26th March 2002 to date and details of how the money raised therefrom has been utilized; and

iii. An account be rendered in respect of Plot No. 563/Residential – Noonkopir Trading Centre, which should give a breakdown of the steps taken by the administrators to recover the said asset from the alleged grabbers;

b. ...

c. That the said accounts are to be rendered within (30) days of the date of this order.”

10. The grant of letters of administration intestate made to the respondents on 27th February 2006 was confirmed on 26th March 2007 on an application for its confirmation dated 27th November 2006, and a certificate of confirmation of the said grant was executed on the same date by Rawal J. Several assets were distributed but the assets the subject of the present application were to be held in trust on behalf on

behalf of the administrators and of the rest of the children, being the applicant, Jacob Ngunyi Wambugu and Stephen Njeru Wambugu.

11. It is common ground therefore that the subject assets were to be held in trust by the administrators for themselves and the other survivors of the deceased. The said assets were trust property, and the administrator respondents were trustees in respect thereof. They stood in a fiduciary position with regard to the assets and were bound by trust law to account of their dealing with them to the beneficiaries, that is themselves and the other survivors, including the applicant herein. It is on that account that the applicant moved the court and obtained the orders made on 30th October 2015.

12. The respondents no doubt did not file any accounts within the thirty (30) days allowed, and that that is what prompted the instant application. However, upon being served they did file a reply wherein they have given an account on all the assets the subject of the application. The applicant has raised various questions on the alleged accounts. The issue now is no longer on the failure to file accounts, but that the respondents have filed accounts that do not answer the order made on 30th October 2015, and for that reason therefore there has been no full compliance with the order.

13. Regarding Kajiado/Kaputiei North/5825, I am persuaded that the account given is adequate. The origins of the property have been described and documented. I am satisfied that Kajiado/Kaputiei North/5825 was not a property of the estate as at the date of the deceased's death going by the documentation attached to the affidavit of the second respondent. The account on Kajiado/Kaputiei North/11914 and 11917 is unsatisfactory. I am satisfied that the applicant and Jacob Ngunyi Wambugu and Stephen Njeru Wambugu consented to the disposal of the properties, as there are special powers of attorney on record, which authorized those sales. The same were registered, and therefore valid. I have noted that the applicant has not renounced the signature purported to be hers in the special Power of Attorney dated 22nd January 2009.

14. However, the administrators were obliged to disclose and document when the said assets were sold, to who and for what consideration and also state how the proceeds of sale were applied. They have claimed that the documentation relating to those assets are not available, ostensibly as the sales happened over seven years ago. That is not good enough. The respondents held those two assets as trustees, for the benefit of other persons. They were therefore bound to account to the beneficiaries for their handling of the trust property. Trust law requires trustees to keep proper accounts. If the respondents in this case had complied with that requirement they would have had catalogues of everything they did with respect to those assets. They should have maintained trust and estate accounts documenting when the property was sold, to who and for what consideration. They should have maintained a file of all the documents, or copies thereof, relating to those properties, inclusive of any relating to transactions touching on the same. The documents should have included copies of the title documents, copies of the sale agreements and transfer documents, copies of the documents evidencing payment of the purchase or receipt of the said payment, among others. The records should have been maintained even after the sale. The office of an administrator is for life, the administrator can be called upon to account for his administration at any time during his lifetime even after he has completed administration. So there cannot be any excuse that the records were not available seven years after the sale. The administrators should surely know the person to whom they sold the property. Such information is not hard to get. It has not been pleaded that an effort was made in that direction.

15. The respondent alleges that the property was utilized to meet family expense, which included the burial of a grandmother. She should have disclosed and supported by documents the alleged family expenses. She should have provided a breakdown of the alleged expenses and copies of receipts as proof that the expenses were indeed incurred. On the burial of the alleged grandmother, alleged as her name was not even disclosed, it should be stated that the disposal of such a person's remains cannot be an expense on the estate of the deceased herein. Funeral costs are an expense on the estate of the deceased, according to section 83(a) of the Law of Succession Act, Cap 160, Laws of Kenya, not for the burial of any other person. If the administrators spent any funds to inter the remains of a person other than the deceased then they ought to reimburse the estate.

16. Regarding Plot No. 388/Residential – Noonkopir Trading Centre, an attempt was made to give a professional account on the rents collected and how the money was applied, but the auditors have remarked in all their reports covering the years 2005 to 2015 that no proper books of accounts were kept and therefore the financial statements prepared by the auditors did not give a true and fair view of the state of the financial affairs relating to the property in question.

17. The auditors' reports no doubt paint a portrait of administrators and trustees who either did not understand their role and duty as administrators and trustees, or did not discharge that role and duty to the standard required. It would appear that they had adopted a cavalier attitude to their obligations. I wish to reiterate what I have stated in paragraph 14 here above: Proper accounts ought to have been kept relating to the rents collected from the said property, and property records kept of how the rental income was utilized. The administrators, as landlords or landladies, should have been issuing receipts to the tenants, as these are the recognized accounting documents. They should also have kept a proper record of how every coin from the rental income was utilized, and kept receipts of any item bought with those funds or any service provided by anybody to the estate paid for from the said monies. If the administrators did not keep such record and did not issue receipts to tenants or did not obtain receipts for any payments that they made out of the said money would signify a singular failure on their part as administrators, for how did they expect to account for their administration of the estate without keeping a proper record of receipts and expenses, and filing away all relevant accounting documents, such as duplicates of the receipts they issued to tenants and other persons, or received upon purchase of items or payment for services and utilities.

18. The account given regarding Plot No. 563/Residential – Noonkopir Trading Centre is that the administrators have been unable to trace the property on the ground, even after seeking the assistance of the relevant authorities. That appears plausible, and the account given is to my satisfaction.

19. I would have found the respondents guilty of contempt of court if they had failed totally to account as ordered. They took quick steps to purge that contempt by giving an account. However, as indicated above that account is not adequate in certain respects. I shall consequently give the respondents thirty (30) days to address all the issues that I have addressed in paragraphs 14, 15, 16 and 17 here above. The matter shall be mentioned after expiry of thirty (30) days of date hereof.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE